

No 138.

1624. July 15.

NISBET *against* SHORT in Leith.

IN an action pursued by one Nisbet against Short in Leith, for payment of some little sums addebted by the defender to ——— Millar, the pursuer's umquhile husband, to whom she was executrix; the defender *alleged*, That the sums contained in the bonds were paid, and offered to prove the same by witnesses. THE LORDS found, That this allegeance of payment could not be proved but by writ or oath of party, and refused to admit the same to be proved by witnesses, albeit that the sum contained in each bond was within L. 40; seeing writ could not be taken away nor destroyed by witnesses.

Act. *Oliphant.*Alt. *Balbes.*Clerk, *Hay.*

The same was found in an action betwixt Maxwell and Aikenhead, albeit the sum was offered to be proved paid per testes omni exceptione majores.

Act. *Aikenhead.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 2. p. 223. Durie, p. 138.*

1624. November 25.

BISSET *against* BISSET.

No 139.

Found in conformity with  
No 134. p.  
12356.

JOHN BISSET, executor to George Bisset, pursues Mr Robert Bisset, son-natural to the said George, for delivery to him of a discharge of eight chalders of victual yearly, which the said umquhile George, in the said Mr Robert's contract of marriage, was obliged to pay yearly to him during the said George's lifetime, and which victual the said pursuer affirmed in his summons was paid by the defunct to the said defender all these years, for the which the pursuer, as executor to the defunct, craved the said discharge. It being *alleged* by the defender, That the payment of the victual yearly, as was libelled, ought to be proved by writ or oath of party, and was not probable by witnesses, in respect it was a matter of great importance, and tended to evacuate and destroy the condition of payment obliged in a contract of marriage, which cannot be taken away but after such manner as it is obliged. THE LORDS repelled the allegeance, and found that it might be proved by witnesses, seeing it was the delivery of victual, and it was not necessary to prove the delivery thereof by writ or oath of party.

The same executor pursuing in another summons, the same defender, for intromitting with 2000 merks of money of the defunct's after the defunct's decease, the LORDS found that he ought to prove that intromission either by writ or oath of the defender, and would not admit the same to be proved by witnesses.

Act. *Burnet.*Alt. *McGill.*Clerk, *Scot.*